

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

KATHLEEN A. STEWART,

Plaintiff,

vs.

Case No. 2005-1022-NO

FOXCROFT OF SHELBY,

Defendant,

and

FOXCROFT OF SHELBY,

Defendant/Third Party Plaintiff,

vs.

UNITED LAWNSCAPE, INC., a Michigan  
corporation,

Third Party Defendant,

and

UNITED LAWNSCAPE, INC., a Michigan  
corporation,

Third Party Plaintiff/Third Party Defendant,

vs.

SSC ASPHALT, LLC,

Third Party Defendant,

and

FOXCROFT OF SHELBY,

Defendant/Third Party Plaintiff,



vs.

SSC ASPHALT, LLC.

Third Party Defendant.

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OPINION AND ORDER

Third Party Defendant SSC Asphalt, LLC ("SSC"), has filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Third Party Plaintiff Foxcroft of Shelby ("Foxcroft"), and Third Party Plaintiff/Defendant United Lawnscape, Inc. ("United") request the Court to deny SSC's motion.

Plaintiff is a resident of Foxcroft's apartment complex. Plaintiff allegedly suffered injuries when she slipped and fell on ice and/or snow while attempting to access her vehicle located in her designated carport. Plaintiff alleges that Foxcroft failed to maintain the premises in a reasonably safe condition.

Prior to Plaintiff's accident, Foxcroft entered into a contract with United to remove snow and ice from its premises. The contract between Foxcroft and United contained an indemnification provision whereby United would indemnify and hold harmless Foxcroft for any injuries resulting from United's negligent performance of its contractual duties. United thereafter entered into a sub-contract with SSC to provide the services United contracted to perform for Foxcroft. This contract also had an indemnification provision. After Plaintiff filed this action against Foxcroft, Foxcroft filed a third party complaint against United for contractual indemnity, common law indemnity, implied contractual indemnification, breach of contract, and contribution. United filed a third party complaint against SSC for indemnity pursuant to contract, and common law indemnity for active negligence. Foxcroft thereafter filed a third

party complaint against SSC for contractual indemnity, common law indemnity, implied contractual indemnification, breach of contract, and contribution.

SSC contends that summary disposition is appropriate on the basis that the ridge of snow that caused Plaintiff's fall was the result of melting snow from the roof of the carports, and also that the contract did not require it to remove snow under the carports. SSC also contends that common law indemnification is not available to Foxcroft or United since they were actively negligent as alleged by Plaintiff. SSC further contends that Foxcroft's claim as a third party beneficiary under the contract between SSC and United fails since it is not the intended beneficiary of the contract.<sup>1</sup>

SSC's motion for summary disposition is brought under MCR 2.116(C)(8) and (C)(10). Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be

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<sup>1</sup> After SSC filed its briefs in support of its motion for summary disposition, Foxcroft filed a reply brief that brought to the Court's attention that SSC did not move for summary disposition of Foxcroft's claims for breach of contract and contribution. SSC thereafter filed a reply brief to Foxcroft's response, raising additional arguments for summary disposition concerning the remaining claims. The Court is satisfied that SSC's arguments on contribution and breach of contract have not been brought to the Court properly and should not be addressed.

supported by evidence produced at trial. *Id.*, at 121. Since the parties are relying on factual evidence in support of their motions, the Court will review the motions under the (C)(10) standard.

In order to ascertain the meaning of a contract, the Court gives the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). All rules of contract interpretation are subordinate to the cardinal rule that the Court must ascertain the parties' intent. *City of Grosse Pointe Park v Michigan Municipal Liability and Property Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005). To comply with this cardinal rule, and to effectuate the principle of freedom of contract, the Court construes clear and unambiguous contractual language according to its plain sense and meaning. *Id.* The language of the parties' contract is the best way to determine what the parties intended. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 476; 663 NW2d 447 (2003). A contract must be construed so as to give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory. *Id.*, at 467. If the language is ambiguous, testimony may be taken to explain the ambiguity. *City of Grosse Pointe Park*, *supra*.

The Court will first address SSC's argument that Foxcroft's claims fail since it was not a party to the contract between it and United, and that Foxcroft does not qualify as a third party beneficiary of the contract between United and SSC.

Third-party beneficiary law in Michigan is controlled by statute. MCL 600.1405 provides, generally, that a contractual promise will be construed as having been made for the benefit of a person or designated class of persons when the promisor undertook to give, do, or refrain from doing something directly to or for the person or class of persons. See MCL

600.1405(2)(b); *Krass v Tri-County Sec, Inc*, 233 Mich App 661, 665-666; 593 NW2d 578 (1999). The Court must objectively determine from the form and meaning of the contract itself whether one is a third-party beneficiary as defined by statute. *Schmalfeldt v North Point Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003). MCL 600.1405 draws a distinction between intended third-party beneficiaries who may sue for a breach of a contractual promise in their favor, and incidental third-party beneficiaries who may not. *Brunsell v City of Zeeland*, 467 Mich 293, 296; 651 NW2d 388 (2002). Third-party beneficiary status requires an express promise to act to the benefit of the third party; where no such promise exists, that third party cannot maintain an action for breach of the contract. *Dynamic Construction Co v Barton Malow Co*, 214 Mich App 425, 428; 543 NW2d 31 (1995).

In the case at hand, the contract between SSC and United provides in pertinent part:

SSC ASPHALT, LLC (Sub-Contractor) of FOXCROFT APARTMENTS agrees to furnish all labor and materials incidental to the specifications of UNITED LAWNSCAPE, INC. (General contractor)

\* \* \*

5. Areas to be plowed:

- All courts, parking lot areas, entrances and approaches.
- All driveways, walkways and roads.
- All fire hydrants will be free and clear of piled snow.
- All mailbox clusters will be clear and safe.

\* \* \*

10. The sub-contractor shall hold harmless and indemnify UNITED LAWNSCAPE, INC., its agents, its representatives, and its employees as well as the complex for property damage or personal injury as a result of snow removal operations.

The Court is satisfied that the language and references to Foxcroft in the contract between SSC and United is sufficient to establish that Foxcroft is an intended third party beneficiary of

the contract. Consequently, SSC's motion for summary disposition of Foxcroft's claims based upon this argument should be denied.

The Court will next address SSC's argument that summary disposition is appropriate on Foxcroft and United's claim for contractual indemnification on the basis that the contract did not require it to remove snow under the carports. In support of this argument, SSC relies upon the testimony of United's representative that carports were not to be cleaned. SSC also relies upon the fact that the contractual language of the contract between Foxcroft and United does not mention the term "carport", but only requires snow removal for "drives, parking lots, sidewalks, porches, stoops, steps, and entryways". United agrees with SSC and argues that its contract with Foxcroft also does not require removal of snow in the carports. In the alternative, United contends that if it is required to remove snow in the carports, then SSC had the obligation as well. In response, Foxcroft relies upon the testimony of its representative that the contract language included the carports, and that its representative had witnessed the removal of snow under the carports.

The Court is satisfied that a question of fact exists whether SSC's contract requires snow removal under the carports. As mentioned above, the contract between SSC and United requires "all courts, parking lot areas, entrances and approaches" to be plowed. The contract is not clear whether "parking lot areas" includes the carports, and therefore is ambiguous. A reasonable factfinder could find the phrase "parking lot areas" to encompass the carports. In addition, the testimony provided to the Court by Foxcroft lends support for this contractual interpretation. Consequently, taking the facts in light of the non-moving party, SSC's motion for summary disposition of United and Foxcroft's claims for contractual indemnification should be denied.

The Court will next address SSC's argument that summary disposition of Foxcroft and United's claims for contractual indemnification is appropriate on the basis that accumulation of snow and ice was caused by water dripping off the carport as opposed to snow removal operations. SSC has provided photographs to support its argument. The Court is unable to determine as a matter of law from the photographs that the accumulation of snow and ice was the result of water dripping from the carport as opposed to SSC's snow removal efforts. Consequently, SSC's motion for summary disposition based upon this argument should be denied.

The Court will next address SSC's motion for summary disposition relating to Foxcroft's claim for common law indemnification. SSC has failed to provide authority for its argument. A party may not merely announce their position, then leave it to this Court to unravel their arguments and search for authority to support or reject their position. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Accordingly, cursory treatment with no citation to relevant supporting authority is appropriate. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001).

Based upon the reasons set forth above, SSC's motion for summary disposition is DENIED. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last claim and does not close the case.

IT IS SO ORDERED.

Dated: August 4, 2006

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DONALD G. MILLER  
Circuit Court Judge

CC: Patrick A. Rooney  
Vincent C. Rabaut, Jr.  
David Polidori  
Auidrey J. Monaghan